

SERVICE DATE – AUGUST 17, 2017

SURFACE TRANSPORTATION BOARD

DECISION

Docket No. AB 1106X

ABE FAIRMONT, LLC—ABANDONMENT EXEMPTION—IN FILLMORE COUNTY,
NEB.

Docket No. AB 6 (Sub-No. 488X)

BNSF RAILWAY COMPANY—DISCONTINUANCE OF SERVICE EXEMPTION—IN
FILLMORE COUNTY, NEB.

Digest:¹ At petitioners' request, the Board held these proceedings in abeyance in 2014 to allow for discussions between the two petitioners and a shipper on the line over which BNSF Railway Company proposed to discontinue service and which ABE Fairmont, LLC, proposed to abandon. The petitioners now ask the Board to reinstate the proceedings. The Board removes these proceedings from abeyance, requests additional information from the parties, and asks them to address various legal precedent.

Decided: August 16, 2017

On July 7, 2014, ABE Fairmont, LLC (ABE), and BNSF Railway Company (BNSF) (collectively, Petitioners) jointly filed a petition requesting exemptions under 49 U.S.C. § 10502 from the prior approval requirements of 49 U.S.C. § 10903. ABE requests an exemption to permit it to abandon approximately 2.77 miles of rail line from milepost 0.93 to milepost 3.70 (the Line). The Line extends southward from a connection with BNSF's east-west main line (at milepost 114.73) at or near Fairmont, Fillmore County, Neb. (Pet. App. 4, at 3; Draft Envtl. & Historic Report, App. 3.) BNSF requests an exemption to permit it to discontinue its trackage rights operations over approximately 0.77 miles of the Line between milepost 0.93 and milepost 1.70, both near Fairmont (Northern Segment). On July 24, 2014, these proceedings were held in abeyance at Petitioners' request pending discussions between Petitioners and The Andersons, Inc. d/b/a O'Malley Grain Company (The Andersons), a shipper that receives service over the Line. On June 16, 2017, Petitioners informed the Board that the matters that prompted the abeyance request had been resolved and requested that the proceedings be reinstated on the Board's active docket.

¹ The digest constitutes no part of the decision of the Board but has been prepared for the convenience of the reader. It may not be cited to or relied upon as precedent. Policy Statement on Plain Language Digests in Decisions, EP 696 (STB served Sept. 2, 2010).

BACKGROUND

Petitioners state that the Line was owned and operated for many years by BNSF's predecessors as part of a cluster of branch lines extending in a generally southerly direction from what is now BNSF's east-west main line at Fairmont, Neb. In 1996, a BNSF predecessor sold that cluster of branch lines to Fillmore Western Railway Company (FWRY), except for the 0.77-mile Northern Segment, which BNSF retained. See Fillmore W. Ry.—Acquis. & Operation Exemption—Burlington N. R.R., FD 33299 (STB served Dec. 12, 1996). In 2001, FWRY obtained an exemption from the Board to abandon its rail line that ran from the connection with BNSF at milepost 1.70 to the end of its track at milepost 10 near Geneva, Neb. (Fairmont-Geneva Line). (Pet. 5.) FWRY, however, never consummated that abandonment. (Pet. 7.) In 2006, ABE purchased the Southern Segment from FWRY (from milepost 1.70 to milepost 3.70); however, ABE did not obtain Board acquisition or operating authority as it believed that FWRY had abandoned the Line and that it was thus not under the Board's jurisdiction. (See Pet. 5.)

Approximately five years later, ABE sought to sell its ethanol plant located adjacent to the Southern Segment. It was at this point that ABE became aware that the Fairmont-Geneva Line abandonment (including the Southern Segment that ABE had purchased from FWRY) had not been consummated and that ABE had in fact acquired a regulated line of railroad at the time of its 2001 purchase from FWRY. (Pet. 6.) Accordingly, ABE sought post-transaction Board authority to acquire the Southern Segment from FWRY. At the same time, ABE also sought authority to acquire the Northern Segment (from milepost 0.93 to milepost 1.70) from BNSF. (Pet. 6-7.) ABE obtained the requisite Board authority to acquire and operate over the Southern and Northern Segments in 2012 (i.e., the Line). See ABE Fairmont, LLC—Acquis. & Operation Exemption—Fillmore W. Ry., FD 35673 (STB served Sept. 21, 2012); ABE Fairmont, LLC—Acquis. & Operation Exemption—BNSF Ry., FD 35683 (STB served Oct. 31, 2012, updated July 19, 2013). As part of that transaction, BNSF retained trackage rights over the Northern Segment to provide rail service to a grain loading facility owned by The Andersons and located on a spur line connected to the Northern Segment. (Pet. at 7.)

Pursuant to the joint petition first filed in July 2014, ABE seeks to abandon the Line (both the Northern and Southern Segments), and BNSF seeks to discontinue its trackage rights over the Northern Segment of the Line. According to Petitioners, once legally abandoned, ABE anticipates selling the Line to Flint Hill Resources Fairmont, LLC (FHR-Fairmont), which now owns the ethanol plant formerly owned by ABE. (Pet. 3, 7.) FHR-Fairmont would operate the Line as private track. (Pet. 4.) Pursuant to an Industry Track Agreement (ITA) between BNSF and FHR-Fairmont, BNSF would retain the contractual right to operate over portions of the Line to continue to provide rail service to FHR-Fairmont and to The Andersons. (Id.)

On July 23, 2014, Petitioners requested that the proceedings be held in abeyance pending discussions between Petitioners and The Andersons. (Pet'rs Letter, July 23, 2014.) On June 16, 2017, Petitioners indicated that the matters that caused Petitioners to request abeyance had been resolved and that The Andersons will not oppose the joint petition for exemptions. (Pet'rs Letter, June 16, 2017.)

DISCUSSION

As stated above, Petitioners filed their joint petition in 2014 but then sought to have it held in abeyance. The Petitioners have now requested to have the proceeding reactivated, which the Board will grant. However, several issues require further explanation or update before the Board can rule on the joint petition for exemption.

First, it is well settled that where there is a common carrier obligation attached to a segment of track, the Board will not allow that segment to become isolated from the rail system as a result of the abandonment of an adjoining segment. See Cent. Or. & Pac. R.R.—Aban. & Discontinuance of Serv.—in Coos, Douglas, & Lane Ctys., Or., AB 515 (Sub-No. 2), slip op. at 12 (STB served Oct. 31, 2008). Here, it is not clear from the record whether the proposed abandonment would result in a stranded segment of track south of the Line, between milepost 3.70 and milepost 10 (i.e., the remainder of the Fairmont-Geneva Line). As explained, it appears that in 1996, FWRV purchased that cluster of branch lines, which included the Fairmont-Geneva Line, and in 2001 sought authority to abandon the Fairmont-Geneva Line. However, FWRV never consummated that authority, which included not only the Southern Segment and but also extended south from its terminus at milepost 3.70 to milepost 10. Consequently, the entire Fairmont-Geneva Line remains part of the national rail system and subject to the Board's jurisdiction.

ABE seeks authority to abandon a portion of the Fairmont-Geneva Line. However, its pleadings do not provide sufficient information to determine whether the proposed abandonment up to milepost 3.70 would leave stranded the section of track south of the Line, extending from milepost 3.70 to milepost 10. ABE must address whether abandonment of the Line would leave stranded the southern section of the Fairmont-Geneva Line.

Second, two shippers currently receive common carrier service over the Line. Following discontinuance and abandonment, one shipper, FHR-Fairmont, would purchase the Line from ABE and operate it as private track served by BNSF pursuant to the ITA. (Pet. 4.) The other shipper, The Andersons, would receive contract service by BNSF also pursuant to the ITA. (*Id.*) If the Board approves the abandonment, removing the Line from the Board's jurisdiction, any regulatory remedies currently available to shippers would also be removed.

While these proceedings were in abeyance, the Board issued a decision in Energy Solutions, LLC—Abandonment Exemption—in Anderson & Roane Counties, Tenn. (Energy Solutions), AB 1128X (STB served Oct. 13, 2015), which could have bearing on this proceeding. In Energy Solutions, the petitioner sought to abandon approximately seven miles of rail line. The Board denied the petition, in part, because five shippers remained on the line who would receive contract service following abandonment and thus lose their regulatory remedies for service failures or inadequacies. *Id.* at 3-4. For this and other reasons, the Board denied the petition to abandon that line through the exemption process. Energy Solutions, AB 1128X, slip. op. at 4. In reaching this conclusion, the Board stated that, among other things, the absence of mitigating factors for the loss of regulatory remedies was troublesome. *Id.* at 4. The Board noted that it had previously granted petitions to abandon where shippers remained on the line and the transactions included protective measures that mitigated the removal of the common carrier

obligation. Id. (citing Union Pac. R.R.—Aban. Exemption—in Pottawattamie Cty. Iowa, AB 33 (Sub-No. 300X) et al. (STB served Jan 20, 2012)); cf. CSX Transp., Inc.—Aban. Exemption—in Grant Cty., W. Va., AB 55 (Sub-No. 746X), slip op. at 2-3, n.6 (STB served Feb. 19, 2016) (explaining that the concerns raised in Energy Solutions were not present because, among other factors, the only shipper on the line was also the line owner).

Although neither shipper has filed in this proceeding, Petitioners' motion notes that they resolved The Andersons' earlier concerns about the proposed abandonment and discontinuance. (Pet'rs Mot. 1, June 16, 2017.) Despite this assurance, to ensure that approval of the discontinuance of service over and abandonment of the Line is appropriate under the Board's exemption procedures, the Board will direct Petitioners to explain how their proposal is consistent with the principles articulated above.

Finally, the Draft Environmental and Historic Report (Draft Report) was prepared in 2012; consultations occurred in September of that year. (See generally, Draft Envtl. & Historic Report.) Petitioners explain that ABE anticipated that the joint petition would be filed in 2012 and because it was not filed until 2014, they provided a supplement to the Draft Report with the petition. (Pet., App. 3 at 3-4.) Given that the Draft Report was prepared nearly five years ago and the supplement nearly four years ago, petitioners are directed to consult with the Board's Office of Environmental Analysis (OEA) on how to proceed with the environmental review.

By September 6, 2017, Petitioners must submit information and, if appropriate, supporting documentation regarding whether the proposed abandonment would leave a stranded segment of track and is consistent with the principles articulated in Energy Solutions. Petitioners must also contact OEA regarding the Draft Report by August 24, 2017.

When Petitioners file this supplemental information, but not before 20 days following Petitioners' filing of any necessary updates to the Draft Report, the Board will begin its review of the joint petition for exemptions.

It is ordered:

1. These joint proceedings are removed from abeyance.
2. Petitioners shall supplement their July 7, 2014 petition for exemptions with respect to Energy Solutions and the stranded segment issue, as described above, by September 6, 2017.
3. Petitioners shall contact OEA regarding the Draft Report by August 24, 2017.
4. This decision is effective on its service date.

By the Board, Board Members Begeman, Elliott, and Miller.